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Supreme Court, U.S.
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No. 95-101

In The

Supreme Court of the United States

October Term, 1995

BARBARA ANDERSON, Ph.D.,

Petitioner,

versus

CUNARD LINE LIMITED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Are issues of federal jurisdiction and removal to be determined by federal courts or state courts?

II. Did the lower courts properly deny petitioner's motion to remand when the established facts showed her claim of Jones Act status was baseless in law and fact and therefore fraudulent?

III. Was the case properly transferred to the United States District Court for the Southern District of New York?

LIST OF PARTIES

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent respectfully urges the Court to deny the petition for writ of certiorari as there is no error in the proceedings below.

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit affirmed both the district court's denial of petitioner's motion to remand after respondent had removed the case on the basis of diversity jurisdiction to the Eastern District of

Louisiana and the district court's granting of respondent's motion to transfer the case to the Southern District of New York.

Both lower court decisions are reproduced in the Appendix to petitioner Anderson's Petition for Certiorari (App. A, A-1; App. B., A-2 to A-9).

JURISDICTION

Respondent does not contest petitioner's statement regarding this Court's jurisdiction. The jurisdiction of the district court was based on the diversity of citizenship of the parties and jurisdictional amount.

STATUTES INVOLVED

The statutes in issue are 28 U.S.C. § 1332 (federal diversity jurisdiction); 28 U.S.C. §§ 1441, 1446 and 1447 (removal); 46 U.S.C. § 688 et seq. (the Jones Act); and 28 U.S.C. § 1404 (change of venue).

STATEMENT OF THE CASE

I. Relevant Uncontested Facts

Southern Methodist University Professor Emeritus of Anthropology, Dr. Barbara Anderson, age 73, filed a petition for damages in Louisiana state court to recover for a personal injury allegedly sustained on May 14, 1994, the

day after she came aboard the cruise ship M/V VISTAFJORD.[1] In the state court petition, Anderson claimed that she was a seaman and a member of the crew of the vessel, an allegation that the United States District Court for the Eastern District of Louisiana found, after respondent removed the case to that court, was a fraudulent claim made solely to defeat the exercise of federal jurisdiction.

Professor Anderson arranged to take a cruise aboard VISTAFJORD in exchange for giving a few anthropology lectures. Cunard encourages such arrangements because they enhance the cruise experience of its customers and because they allow semi-retired or retired clergy and academics, like Professor Anderson, to participate in recreational activities and visit countries which they might otherwise find unaffordable. Under the terms of the arrangement, Professor Anderson was not compensated monetarily for her services and was not reimbursed for incidental expenses, including travel to and from the vessel, gratuities, laundry, or drycleaning.

Cunard provided Professor Anderson with boarding tickets for each of the two cruises on which she sailed. The tickets were designated "Passenger Ticket and Passenger Coupon" and were issued subject to the terms and conditions printed on the tickets. Article 22 of the terms and conditions contained the following clauses:

> (a) This passage contract applies to claims, suits and litigation of any kind against the

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[1] Despite her alleged injury, Professor Anderson remained aboard the VISTAFJORD until the conclusion of her cruise on May 27, 1994.

Company "in personam" or the vessel "in rem" or otherwise.

(b) It is agreed by and between the passenger(s) and the Company that any and all disputes and matters whatsoever arising under, in connection with, or incident to the Passage Contract shall be litigated, if at all, in and before any court located in the City of New York, State of New York, U.S.A., to the exclusion of the courts of any other city, state or country.

In accordance with the ticket, Professor Anderson was registered as a passenger on the ship's manifest and passenger list. Professor Anderson slept in a passenger state room, not crew quarters. She ate in the passenger's dining room, not the crew mess. Professor Anderson did not have to stand 8 hours of navigation watch or work the 8 - 10 hour daily shifts (not including overtime) required of VISTAFJORD crewmembers. Like all other passengers, Professor Anderson was not required to report her whereabouts to the ship's captain or officers during the cruise, and was free to come and go as she pleased while in port. Unlike crewmembers, she was not required to request "shore leave" or "liberty" from VISTAFJORD's master.

Unlike members of the ship's crew, Professor Anderson was not required to obtain seaman's papers prior to the cruise or to sign the ship's articles upon boarding. She was not required to undergo a physical examination or drug screening. Cunard did not pay her travel expenses to or from VISTAFJORD, as it did for members of the crew. Her quarters were not subject to inspection, and she was not required to fill out a W-2 tax form. She did not

have free laundry service. After the alleged accident, Professor Anderson did not request a "hospital ticket" or follow any of the procedures required of crewmembers for medical treatment ashore.

Professor Anderson introduced in proceedings below her "guest-lecturer information sheet," which established the following uncontested facts:

(a) Cruise staff assistants were assigned to Professor Anderson and to the other passengers, but *not* to VISTAFJORD crewmembers;

(b) Professor Anderson and the other passengers were expected to tip their passenger dining room waiters and passenger stateroom steward/stewardess; VISTAFJORD crewmembers do *not* tip one another;

(c) Professor Anderson and the other passengers were under the special care and attention of the cruise director, unlike VISTAFJORD crewmembers; and

(d) Professor Anderson lectured only seven times, from 1 - 2 hours each, during the fifteen days she was aboard the vessel.

It is also uncontested that Professor Anderson was not required to conduct tours ashore. The only restriction on her activity was that she could not gamble on board. Also, Cunard expressly expected Anderson and others like her to be polite to other passengers. In sum, petitioner received free cruise passage and meals in exchange for her giving a few anthropology lectures to other passengers.

II. Proceedings Below

About six months after her second cruise ended, petitioner filed a Jones Act (46 U.S.C. § 688, *et seq.*) personal injury claim against respondent in Louisiana state court. This petition was served on Cunard at its New York City office pursuant to the Louisiana Long Arm Statute on December 21, 1994.[2] On January 20, 1995, Cunard timely removed the case to the United States District Court for the Eastern District of Louisiana on the basis of diversity of citizenship and requisite jurisdictional amount.

Anderson has never contested the fact the parties are indeed of diverse citizenship or that the case was properly removable, except on the basis of her claim of Jones Act seaman status. In the removal notice, Cunard specifically alleged that Anderson's Jones Act claim was fraudulently pled for the purpose of thwarting removal. On January 23, 1995, Anderson filed in New York state court a complaint virtually identical to the Louisiana petition, seeking $500,000 in damages. In that action, she conceded

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[2] This case substantiates the forum-shopping concerns of Justices Kennedy and Thomas in their dissent in *American Dredging Co. v. Miller*, 510 U.S. ___, ___ S.Ct. ___, 127 L. Ed. 2d 285, 303, 305-7 (1994) because there is no connexity between the facts of this case and the state of Louisiana. Professor Anderson was and is a Texan. The alleged injury occurred in Greece. Cunard is a foreign corporation which does not maintain an office in Louisiana. Plaintiff's medical treatment was in Greece and near her home in Dallas, Texas. None of the potential witnesses in this case is a Louisiana citizen. The only reason Louisiana was selected by Anderson was some perceived benefit to having her claim adjudicated before the courts of that state.

she was a passenger if she were ultimately found not to be a Jones Act seaman.

On February 14, 1995, Anderson filed a motion to remand with the district court, alleging that her claim of Jones Act seaman status precluded removal of her claim to federal court. Cunard filed a motion to dismiss and/or transfer Anderson's case on February 16, 1995. The motions (with appended memoranda, affidavits and documentary evidence) were consolidated for hearing on March 8, 1995, but by agreement were submitted on briefs.

On March 31, 1995, the district court denied petitioner's motion to remand because the uncontested facts established Anderson was not a Jones Act seaman but was instead simply a passenger. The district court in Louisiana also transferred the case to the United States District Court for the Southern District of New York.

The district court recognized that in the removal context Cunard had the burden of proving Anderson's Jones Act claim was fraudulently pled. *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206-207 (5th Cir. 1993). The district court reviewed the evidence submitted by the parties, which was not in conflict, and applied the Jones Act status test set forth in *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 438-439 (5th Cir. 1991) and which was recently cited with approval by this Court in *Chandris, Inc. v. Latsis*, ___ U.S. ___; 115 S.Ct. 2172, 2189, 2191 (1995).[3] After careful consideration, the district court

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[3] The district court and Fifth Circuit anticipated this Court's recent decision in *Chandris*, flatly rejecting the "voyage

determined the uncontested facts established Anderson's Jones Act claim was fraudulent.

In granting respondent's motion to transfer pursuant to 28 U.S.C. § 1404, the district court noted that New York was the more convenient forum for the parties, there being no contact whatsoever with Louisiana, and that New York was the forum designated in Anderson's "Passenger Ticket and Passenger Coupon" as the only one in which disputes of this type could be brought.

Rather than appeal, Anderson filed a petition for a writ of mandamus with the Court of Appeals for the Fifth Circuit. After considering Anderson's arguments, the same arguments that she urges here, the appellate court denied Anderson's petition on April 17, 1995.

Anderson now asks this Court to disregard its own jurisprudence and ignore both well-settled jurisprudence of the lower courts and federal legislation concerning jurisdiction, removal and venue. Petitioner would, in effect, have the judiciary of the several states decide in the removal context the breadth of jurisdiction which a federal court could lawfully exercise. This extraordinary argument has no basis in law or fact.

SUMMARY OF THE ARGUMENT

Petitioner's assertion of a Jones Act claim is totally inconsistent with the uncontested facts concerning her

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test" urged by Anderson below. *Chandris*, 115 S.Ct. at 2187. Anderson does not reurge her "voyage test" argument here.

passage on the VISTAFJORD. She was simply a passenger on the vessel, and her claim of seaman status was fraudulent as a matter of law. The lower courts properly applied the seaman status analysis mandated by this and other courts in a long line of cases ending with the Court's recent ruling in *Chandris, Inc. v. Latsis*, ___ U.S. ___, 115 S.Ct. 2172 (1995). Petitioner's assertion that the question of seaman status should have been decided by the state court, not the federal district court to which the case had been removed, would effectively allow the state court to determine the scope of federal jurisdiction. Finally, petitioner's suggestion that the district court erred in transferring the case is not only unsupported by any legal authority, but also ignores the plain wording of the federal statute dealing with change of venue.

REASONS FOR DENYING THE WRIT

The Petitioner fails to satisfy criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. That is, the case involves no point of law which is in conflict amongst the federal circuit courts, and the decision below is in accord with Supreme Court precedent. Further, the facts in this proceeding are sufficiently unique that the precedential value of the case is likely to be minimal.

Although petitioner alleges legal error by the courts below, the petition for certiorari fails to cite *any* Jones Act removal or seaman status case which conflicts with the holding in the case at bar. Similarly, petitioner offers no authority in support of her novel argument that a federal

court must make a specific factual finding that a state court is "intellectually incapable" of a Jones Act status analysis before the federal court may exercise federal jurisdiction and confirm the removal of a case from state court. The practical result of the ruling petitioner advocates would be to vest with the state courts the authority to determine when claims of questionable, indeed fraudulent, Jones Act seaman status could be removed to federal court, directly contrary to the statutory scheme and the policy considerations underlying the removal statute.

Finally, Anderson asks the Court effectively to ignore the federal change of venue statute, which specifically authorizes the district court to transfer the case to another district as the interests of justice and the convenience of the parties require.

ARGUMENT

I. Removal jurisdiction is determined by federal courts, not state courts.

Petitioner cites no authority in support of her assertion that state courts rather than federal district courts should determine the scope of federal removal jurisdiction. This indeed would be the practical result of her argument that federal courts should defer to state courts to determine questions of fraudulent claims of Jones Act seaman status unless the federal court makes a specific finding that the state court where the action was originally filed, " . . . was unable, intellectually or otherwise, to undertake the same Jones Act analysis undertaken by

the District Court."[4] This dearth of authority is hardly surprising in light of the novelty of the argument. Contrary authority abounds.

There is no question but that the district court has original jurisdiction of this case in light of the diverse citizenship of the parties and the jurisdictional amount having been satisfied. 28 U.S.C. § 1332 (1993). It is similarly elementary that the removal statue, 28 U.S.C § 1441 (1993), authorizes removal from state court of any civil action of which the federal district courts have original jurisdiction, unless, as with legitimate Jones Act claims, there is a Congressional mandate to the contrary. It also cannot be disputed that, by statute, it is the federal court, *not* the state court, which considers any motion to remand and determines whether removal was proper. 28 U.S.C. §§ 1446, 1447 (1993).[5]

Finally, it is well-settled that when a Jones Act claim has been fraudulently pled in state court to defeat removal, the *federal* court may pierce the pleadings to

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[4] In making this argument, petitioner asks this court to overlook the strict time requirements of the removal statute which require defendant to remove the case within 30 days after the state court petition is served. There can be no guarantee that a state court would decide disputes concerning seaman status within 30 days.

[5] See, e.g., *Kansas Public Emp. Ret. System v. Reimer & Koger*, 4 F.3d 614, 618-619 (8th Cir. 1993) cert. den'd 114 S.Ct. 2132 (1994) (whether case is removable is question of federal law to be decided by federal courts; state legislature and judiciary cannot defeat the congressionally conferred right to remove a case from state court to federal court; federal courts should not condone procedure intended to prevent removal).

determine whether the claim is baseless in law and fact. See, e.g., *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206-207 (5th Cir. 1993). These federal statutes and precedents are clear. They vest with the federal courts, not the state courts, the authority to determine the scope of federal jurisdiction in the removal context. To hold otherwise would thwart the essential policy consideration underlying the diversity and removal statutes – to make a federal forum available to a non-resident defendant who may be exposed to local prejudice in a state court.

Because the relevant statutes are so clearly and irreconcilably at odds with the relief petitioner seeks, her claim should be rejected as totally without merit.

II. The District Court and the Court of Appeals correctly rejected as factually and legally groundless the petitioner's claim of Jones Act status consistent with the standards established by this Court.

A passenger is "one who travels in a public conveyance by virtue of a contract with the carrier, express or implied, paying fare or something accepted as an equivalent therefor." *Rutledge v. A.P. Boat Rentals, Inc.*, 633 F. Supp. 654, 656 (W.D. La. 1986); *Thomas J. Schoenbaum*, ADMIRALTY AND MARITIME LAW, § 5-5, at 169 (2d ed. 1994). Prior to the voyage in question, petitioner and respondent agreed that in lieu of a cash payment for the cruise tickets, petitioner would give several anthropology lectures to other passengers. By definition, then, Anderson was a passenger aboard M/V VISTAFJORD since she gave something of value in exchange for her passage. One cannot be a passenger and a member of the crew at

the same time, so Anderson's claim of seaman status must fail.

Not only do the facts of record show Anderson was simply a passenger, but also they show with equal force that she was not a seaman. The test of Jones Act seaman status is whether Anderson had a more or less permanent connection with the vessel that was substantial in terms of both its duration and its nature. *Chandris, supra,* 115 S.Ct. at 2190. The "connection" Anderson had with VISTAFJORD was essentially that of every other passenger. She was aboard to take a pleasure trip , like every other passenger, but, unlike them, she paid for her fare by agreeing to give lectures during the course of the voyage. While petitioner would have the performance of these lectures in lieu of payment of a passenger fare give rise to an employment relationship and to seaman status, she fails to cite to the Court a single case in which such a result was reached. In fact, Anderson fails to cite any status case whatsoever, which points up the weakness of her argument that the district court erred in concluding that her allegation of seaman status was fraudulent.

In contrast, the leading Jones Act status cases[6] each involve fact situations which point up the fallacies of petitioner's claim. For example, each of the leading status cases involve workers, whether traditional or non-traditional crewmembers, whose presence aboard the vessel is incidental to their earning wages. It is uncontested that

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[6] *Chandris; Offshore Co. v. Robison,* 266 F.2d 769 (5th Cir. 1959) and their progeny.

Professor Anderson did not earn wages aboard VISTAFJORD, unlike members of the crew, but simply exchanged her lectures for a vacation cruise. Similarly, there are no indicia in this case of the employer/employee relationship that is an absolute prerequisite to a finding of Jones Act status.

Further, Anderson's argument regarding seaman status was made and rejected over twenty years ago in *Steuer v. Nederl-Amerik Stoomvaart Maatschappf*, 362 F. Supp. 600 (S.D. Fla. 1973), the only other reported case dealing with a claim of seaman status by a passenger who was given a free cruise in exchange for performance of certain limited services. In that case, a retired clergyman obtained free passage aboard a cruise vessel in exchange for conducting religious services. After he suffered a heart attack, he brought suit to recover maintenance, cure and repatriation expenses, to which only seamen are entitled. The court applied the *Robison* seaman status test and held that the clergyman was a passenger, not a seaman. *Steuer*, 362 F. Supp. at 602-604. Indeed, the court specifically held that: "To conclude that Rabbi Steuer was a seaman would be an impossible strain on the imagination and would defy not only the law, but common sense." *Id.* at 605.

As in *Steuer*, Professor Anderson was assigned to a passenger stateroom, not crew quarters. Professor Anderson ate in the passenger dining room, not the crew mess. She did not have to stand eight hours of navigation watch or work the 8-10 hour daily shifts (not including overtime) required of VISTAFJORD crewmembers. Unlike crewmembers, Professor Anderson could freely go ashore in port and was not required to request "shore leave" or

"liberty" from VISTAFJORD's master. Except for the expectation that Professor Anderson would conduct anthropology lectures (like Rabbi Steuer's religious services), Professor Anderson was in all respects a passenger.

Contrary to Anderson's assertions, the district court carefully considered and discussed all aspects of Anderson's presence aboard the VISTAFJORD, including her "limited duties" (to give lectures, be considerate of other passengers and not to gamble) in the context of the Jones Act status test set forth in *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 438-439 (5th Cir. 1991) and recently cited with approval in *Chandris, Inc. v. Latsis*, ___ U.S. ___, 115 S.Ct. 2172 (1995).[7] On the basis of these authorities, the courts below held that giving lectures during a brief vacation cruise does not transform a passenger into a Jones Act seaman. Anderson's claim to the contrary, being totally without support in the jurisprudence, was properly rejected.

III. The district court correctly transferred this matter to the United States District Court for the Southern District of New York.

Although petitioner does not enumerate as an issue presented to the Court the propriety of the transfer of the case to New York, petitioner does argue in the text and in

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[7] The *Chandris* and *Palmer* status test is in pertinent part the same as the Fifth Circuit applied in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), which the district court in *Steuer* also applied.

the conclusion of her brief that it was error for the district court to do so. This argument, to the extent it is properly before the Court, is also without merit.

The federal venue statute, 28 U.S.C. § 1404(a), specifically states that a district court may transfer any civil action to any other district where it might have been brought. There is no dispute, and could be no dispute, that petitioner could have brought her action in the United States District Court for the Southern District of New York.

Although it is not made entirely clear, petitioner seems to argue that the court in the Eastern District of Louisiana should not have transferred the case to the Southern District of New York since, if petitioner had filed her initial lawsuit in New York state court, respondent could not have removed the action to New York federal court. Petitioner's claim that such a New York state court action could not have been removed is not explained in her petition, but is presumably based on her wrongful assertion that Cunard is a New York citizen. There is nothing in the record to this effect, and the assertion is simply wrong since Cunard is a citizen of a foreign nation, the United Kingdom.

In any event, though, petitioner's argument is hypothetical and completely irrelevant since she chose to file this action in a Louisiana, not a New York, state court. Once she made that choice, federal statutes concerning removal and transfer controlled the case and mandated the conclusions reached by the courts below. The district court did not abuse its discretion, but merely followed

the clear dictates of the law by transferring the case to New York federal court.

CONCLUSION

In conclusion, Cunard prays that this Court deny petitioner Anderson's petition for writ of certiorari because the case presents no issue appropriate for the Court to review, and because the lower courts' holdings were not in error.

Respectfully submitted,

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